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Book Review

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Laughrey: Book Review
BOOK REVIEW

DIVORCE MEDIATION: THEORY AND PRACTICE.
Edited by *Jay Folberg* and *Ann Milne*. New York: Guilford Press, 1988.
Pp. 473. \$39.50

NANETTE K. LAUGHREY*

As the practice of divorce mediation continues to grow, more and more professionals need training and literature to develop skills and perspective. A welcome addition to their libraries will be *Divorce Mediation: Theory and Practice*, edited by Jay Folberg and Ann Milne. In the preface, the editors explain that the purpose of the book is to examine divorce mediation from an interdisciplinary perspective. They achieve this goal with a series of articles written by professionals from such diverse fields as anthropology, sociology, psychology, law, and social work. Each article examines a different aspect of divorce mediation and provides the special insight that comes with the professional background of the author. The articles are rich enough in detail and contain sufficient practical suggestions that they will be of interest to the practitioner who has already received some training or had some experience as a mediator. However, the novice can also benefit from the book because of its panoramic overview.

In Chapters Two and Five, the authors explore the psychological aspects of the dissolution process and identify the emotional stages that divorcing couples are likely to encounter. In Chapter Six, the legal dimensions of divorce mediation are examined. Chapters Seven, Eight, and Nine compare the practice of divorce mediation in a law office, a mental health facility, and the court. Chapters Thirteen through Twenty cover the more practical aspects of divorce mediation, including the problems of balancing power, breaking impasse, confidentiality, and ethics from both a legal and mental health perspective. Finally, Chapters Twenty-one and Twenty-two present the findings from three research projects which have compared mediation with the traditional adversarial process.

By collecting a series of articles, the editors provide the reader with a diversity of opinion, perspective, and style that no single author could duplicate. These benefits, however, are not without cost, for inherent in an anthology are the problems of lack of integration and repetitiousness. *Divorce Medi-*

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ation: Theory and Practice is no exception. Because each author is working independently, he or she cannot be sure what has gone before or what will come later in the book, necessitating at least a general introduction to mediation and the evils it was intended to correct. The win-win concept, the need to deal with the emotional issues of a divorce as well as the legal, the need to focus on the future rather than the past, and the importance of self-determination are themes that are repeated, expanded on, summarized, and dissected until the reader's eyes begin to glaze over.

Somewhat more frustrating is the lack of integration that occurs when multiple authors discuss the same subject. In Chapter One, Folberg notes that many practitioners believe cases involving physical abuse should not be mediated. In Chapter Seven, however, Emily Brown concludes that mediation may be preferable in abuse situations because it permits the couple to resolve their problems in a new way. In Chapter Nine, the use of male-female mediation teams is promoted, but in Chapter Twelve it is criticized. In no one place in the book, however, are these conflicting theories examined. The readers are left to do the integrating on their own. More editorial cross references would have aided this process and a more in depth introduction to each chapter could have identified potential inconsistencies and explained them as either real conflicts or merely different ways of explaining the same thing.

The structure of the book also requires the reader to jump from one section to another to get a complete picture of a single subject matter. In Chapter Five, Florence W. Kaslow describes the emotional stages that a divorcing person passes through and how these emotions might be manifested during mediation, but she does not explain how these emotions can be effectively addressed by the mediator. She explains that a client may withdraw from the mediation process because of depression or may refuse a joint custody arrangement because of unresolved anger over the dissolution of the marriage, but she does not take the next step and give practical suggestions about how the mediator could respond to these problems. This task is left to later authors who provide a less descriptive and more practical, action oriented approach to emotional issues.

While these structural drawbacks are occasionally frustrating or confusing, they are a natural consequence of the collected essay approach adopted by the editors. The reader must do a little more work to get an integrated perspective, but in exchange the reader gets a global overview of mediation that is diverse in both content and style. In addition to this global overview, *Divorce Mediation: Theory and Practice* provides some very specific practical aids for the reader who is interested in developing his or her own mediation practice.

First of all, it has extensive citations to additional resources. At the end of each chapter are references to books and articles that support the statements contained in the text. A compilation of these references will provide the reader with an extensive bibliography of the current literature on divorce mediation. Several references are also made in the text to different organizations which would be good resources for more in depth information.

Next, the book contains several useful practice aids. For example, one lawyer-author provides excerpts from letters he has written to clients explaining several different issues that a mediator may frequently confront. Another author gives hints on how to conduct the first conference and includes a sample letter of agreement that is signed by both the clients and the mediator. In another section, the reader is provided copies of the standards for divorce mediation that have been developed by the American Bar Association and the Association of Family and Conciliation Courts.

Finally, there are several chapters that are devoted to specific skill issues. The chapters on breaking impasse, balancing power, the ethical constraints of mediation, and the problems of confidentiality would be especially helpful to someone who wishes to develop or refine their mediation skills. The authors of these chapters give concrete suggestions about how to respond if they are subpoenaed to testify at trial, how to break an impasse in negotiations that is caused by a value conflict between the husband and wife, or how to help a client deal with conflict rather than avoiding it. Of course, no book that provides a panoramic overview of divorce mediation can also give a step by step guide to setting up a mediation practice, but *Divorce Mediation: Theory and Practice* is a good beginning.

One arguable deficiency in the text is that there is no article which is truly critical of divorce mediation. A recurring theme, both stated and implied, is that divorce mediation is a better way to resolve most dissolution disputes than is the adversary system. While there is good authority to support that position, there is also literature which disputes it. For example, some feminists argue that divorce mediation is biased in favor of men. Women, therefore, do not fare as well in mediation as they do when they are represented by an attorney. A cause for these feminist concerns may be discerned from values that some mediators share. In Chapter Three, Linda K. Girdner states that many mediators favor co-parenting and economic independence for former spouses and that the values of the mediator are likely to be reflected in the ultimate settlement reached by the parties. Another author notes that he encourages each marital partner to pay one-half of the mediation fees.

While self-sufficiency may be a worthy goal, the reality is that self-sufficiency can rarely be achieved by the homemaker spouse unless there are substantial marital assets to divide. The lost earning capacity that results when homemakers remove themselves from the labor force to care for families can rarely be recouped by either retraining or reentry into the labor force. The problem is further exacerbated by the continued devaluation of jobs that traditionally are filled by women. When economic self-sufficiency is a goal of the dissolution process, it is likely that many women will suffer a disproportionate reduction in their standard of living because of the traditional caretaker role that they have assumed during the marriage.

Men can be similarly disadvantaged in the dissolution process as a result of their traditional role as income producer rather than physical caretaker. Because custody decisions in the adversarial system are substantially influ-

enced by past parent involvement, the nurturer mother is in a better position at the time of divorce to win a custody battle than is the income producer father. There is in fact evidence that mothers will use their superior parenting position to extract financial concessions, and fathers will use their superior economic position to extract parenting concessions. This balance of power could be upset if the mediator directs the couple toward co-parenting and self-sufficiency because the mediator has then addressed the concerns of the disadvantaged income producer but has not addressed the concerns of the disadvantaged homemaker. The problem may be especially acute if custody mediation is mandatory while the financial issues are decided in the adversarial system after the custody dispute is resolved.

Divorce Mediation: Theory and Practice does not contain an exact assessment of the impact mediation has had on the amount of money received by women who rely on mediation rather than the adversarial system. In Chapter Twenty-Two, however, the results of a recent research project show that "there are few differences in child-support arrangements among individuals exposed to mediation versus those relying on lawyer negotiations or court decree." The same research project shows that most couples who reach agreement through mediation opt for joint custody. It is possible then that some of the disadvantages fathers suffer in the adversarial system are diminished by the mediation process but the financial disadvantage that women have been suffering in the adversarial process may not be similarly improved. If mediators would instead encourage economic parity with each spouse contributing what they were capable of producing, then the burden of the dissolution process would be more equally borne by men and women.

In the context of a book review, the issue is not whether women are or are not disadvantaged by mediation. The issue is whether *Divorce Mediation: Theory and Practice* objectively presents and synthesizes the feminist arguments against divorce mediation so that the reader can begin to draw his or her own conclusions. This does not seem to have occurred, for while some of the feminist arguments are raised from time to time in the book, they are stated in skeletal form by authors who disagree with them and who then proceed to thoroughly discredit them.

The pro-mediation bias of the authors is also seen in the narrow way in which they sometimes define the adversarial process. The assumption is often made that a judge or other third party will resolve the dispute between the husband and wife, depriving the parties of self-actualization. In truth, most dissolutions are settled without adjudication, and the parties are either substantially involved in the settlement negotiations via their lawyer, or in fact, conduct the negotiations themselves and only use a lawyer to review the final agreement. Also, mediation advocates sometimes overlook the obligation of the lawyer to counsel his or her client. For example, the adversarial system is thought by some to be particularly inappropriate in child custody disputes because the lawyers for the mothers or fathers are supposed to represent their client and not be concerned about the best interest of the child. In fact, many

lawyers recognize that the best interest of the child may coincide with the best interest of the client. It would rarely be in the best interest of a parent suffering from a serious mental disease to have custody of a child if custody would exacerbate the mental illness or be adverse to the needs of the child. Lawyers representing custodial parents frequently explain the need to continue the relationship between the child and the noncustodial parent and why that is in the best interest of the custodial parent as well as the child and the noncustodial parent. It is true that the lawyer in the courtroom represents only the client's wishes, but the lawyer assumes a different role in the office where his or her job is to counsel and not advocate.

Finally, while separation agreements may very well be influenced by the law, most lawyers recognize that domestic relations law is fluid. So much discretion is given to the trial court judge that adjudicated results are difficult to predict. As a result, more and more lawyers focus on the expressed needs, values, and personality of their client rather than the law. This is often done in face to face negotiations with both attorneys and clients present.

Folberg states in Chapter One that mediation should not be compared to a romanticized vision of the adversarial process. Likewise, it is inappropriate to create a caricature of the process used by many lawyers to resolve family law disputes. What seems to be needed is research to examine how divorce cases today are in fact being processed by lawyers and to determine if some modified adversarial system is evolving that shares some of the characteristics of mediation but retains many of the features of the traditional adversarial process. Folberg recognizes the problem of overselling mediation, but by failing to include an objective criticism of divorce mediation and by narrowly defining the litigation process, he neglects an important perspective that would have enhanced his and Ann Milne's book. This is a small flaw, however, in an otherwise excellent and detailed introduction to divorce mediation.

